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No. 73-198

In the Supreme Court of the United States

OCTOBER TERM, 1973

ROBERT LESLIE ABRAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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In April 1971, a grand jury in the Northern District of Illinois returned an indictment which charged that on or about April 8, 1970, and continuing to and including the date of the indictment, petitioner had failed to report for induction into the United States Armed Forces, in violation of 50 U.S.C. App. 462(a). After a jury-waived trial, petitioner was convicted as charged and sentenced to three years' imprisonment. The court of appeals affirmed in a lengthy opinion (Pet. App. A).

Petitioner argues (1) that the district court erred in basing guilt solely on a finding that he received a letter from his draft board ordering him to report for induction, in the face of contradictory evidence; and (2) that this Court's decision in *Toussie* v. *United States*, 397 U.S. 112, requires reversal of his conviction, on the

ground that failure to report for induction is not a continuing offense. Both these contentions are answered in the opinion of the court of appeals, upon which we rely. We note further as to the first claim that the court of appeals examined the evidence and concluded on this factual issue that the ruling of the trial court was not clearly erroneous (Pet. App. 3a-4a), The court of appeals did not hold that the presumption of regularity was unrebuttable; it merely held that the trial court was justified in finding petitioner's evidence not sufficient to constitute rebuttal.

With respect to petitioner's second claim, we deem it appropriate to make the following additional observations:

In *Toussie, supra,* the defendant was convicted of having failed to register with his draft board within five days of his eighteenth birthday, which occurred in 1959. Despite a five-year statute of limitations, the defendant had not been indicted until 1967. This Court, after reviewing the history of Presidential proclamations setting specific dates for selective service registration, held that although there was, under selective service regulations, a continuing duty to register, the statute of limitations began to run five days after the defendant's eighteenth birthday and barred the prosecution. 397 U.S. at 121, n. 17.

Since the instant case involves no statute of limitations problem, petitioner's reliance upon *Toussie* is misplaced. See *United States* v. *Bruckman,* 466 F. 2d 754, 757 (C.A. 7). This Court's holding in *Toussie* was grounded on a reading of Presidential proclamations on draft registration and was limited to prosecutions for failure to register. Petitioner argues by attempted analogy to *Toussie* that there is no continuing duty to

report for induction. As noted, this Court in *Toussie* did not invalidate the continuing duty regulation, but merely held that it could not be used to extend the statute of limitations. See 397 U.S. at 121, n. 17; *United States* v. *Owens*, 431 F. 2d 349, 351 (C.A. 5); *United States* v. *Williams*, 433 F. 2d 1305, 1306 (C.A. 9).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1973.